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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1134

HARRY ROADEN, - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY, - Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals of Kentucky (Petition for Certiorari, pp. 25-30) is reported at 473 S. W. 2d 814. A petition for rehearing was denied without opinion. Petitioner was tried in the Circuit Court of Pulaski County, Kentucky, by a jury and there is no opinion of that Court.

JURISDICTION

The opinion of the Court of Appeals of Kentucky was rendered on June 25, 1971. The mandate (judgment) of the Court of Appeals of Kentucky was entered on December 17, 1971, and a petition for rehear-

ing was denied on the same day. The petition for writ of certiorari was filed on March 6, 1972, and was granted on April 24, 1972. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

United States Constitution, Amendment XIV, Section 1:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statutes, Chapter 436, Section 101, Subsections (1), (2), (8), and (9):

"436.101 Obscene matter, distribution, penalties, destruction.

(1) As used in this section:"

(a) "Distribute" means to transfer possession of, whether with or without consideration.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matter.

(d) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(2) Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints,

exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than $1,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars, or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this subsection, he is punishable by fine of not more than $2,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed $25,000, or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If a person has been twice convicted of a violation of this section, a violation of this subsection is punishable by imprisonment in the state penitentiary not exceeding five years.

* * * * * *

(8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the matter named in the charge is obscene. The special verdict or findings on the issue of obscenity may be: "We find the..... (title or description of matter) to be obscene," or "We

find the ..... (title or description of matter) not to be obscene," as they may find each item is or is not obscene.

(9) Upon conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the Attorney General, Commonwealth's attorney, county attorney, city attorney or their authorized assistants, or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

QUESTION PRESENTED

In the absence of a prior adversary hearing, is the seizure incident to arrest of allegedly obscene material, a violation of due process of law?

STATEMENT OF THE CASE

On October 21, 1970, the petitioner was convicted following a jury trial for violation of Kentucky Revised Statutes Chapter 436, Section 101 (A. 2; Petition for Certiorari pp. 23, 24). He was sentenced to pay a fine of $1,000 and to serve six months in the Pulaski County Jail (Petition for Certiorari pp. 23, 24). A timely appeal was taken to the Court of Appeals of Kentucky, and the conviction was affirmed (Petition for Certiorari pp. 25-31).

The events which culminated in the conviction began on the night of September 29, 1970, when the Sheriff

of Pulaski County, Kentucky, purchased a ticket to Highway 27 Drive-In Theatre located south of the City of Somerset, on U. S. Highway 27 in Pulaski County, Kentucky (A. 9, 10, 16). Being exhibited at the theatre that evening was a film entitled "Cindy and Donna" (A. 10). After viewing the entire film, the Sheriff proceeded to the projection booth and there arrested petitioner, the manager of the theatre, upon a charge of exhibiting an "obscene" film to the general public (A. 10, 11). At the same time and place the Sheriff seized the film consisting of five reels in two metal cannisters (A. 10, 13-16).

On the day following the arrest of the petitioner and seizure of the film, the Sheriff appeared before the Grand Jury of Pulaski County, and as a result an indictment was returned charging petitioner with the offense of which he was convicted (A. 3, 4, 11).

Admittedly, the Sheriff had no warrant when he made the arrest and seizure, and there had been no hearing of any kind before a judicial officer to focus on the question of obscenity (A. 17, 19, 20).

On October 3, 1970, the petitioner entered a plea of not guilty, and the case was set for trial in the Pulaski Circuit Court on October 20, 1970 (A. 1, 5). On October 12, 1970, petitioner filed in the Pulaski Circuit Court, a motion to suppress the film as evidence and dismiss the indictment (A. 6, 7). The motion was predicated upon the ground that the film was illegally seized in violation of due process of law because there had been no prior adversary hearing (A. 6, 7). On October 16, 1970, arguments were heard by the Judge

of the Pulaski Circuit Court upon the motion to suppress the film as evidence and dismiss the indictment (A. 7). The motion was overruled by the Judge of the Pulaski Circuit Court on October 20, 1970, the day petitioner's trial began (A. 8).

Upon the trial in Pulaski Circuit Court, the Sheriff and one of his deputies were the only witnesses for the prosecution (A. 8-21). The Sheriff was permitted to give a brief description of the film stating that it revealed the nakedness of the human body and displayed "intimate love scenes" (A. 12). The Sheriff further stated that upon viewing the film, he, on his own, determined that it appealed to prurient interest, such determination on his part leading to the arrest and seizure (A. 15). At no point prior to the seizure did the petitioner or anyone in his behalf have an opportunity to contest the judgment of the local law enforcement officer that the film appealed to prurient interest (A. 17, 19, 20).

During the testimony of the Sheriff the film was introduced in evidence over the objections of the petitioner, and at the time of its introduction petitioner's motion to suppress was renewed and again overruled by the trial judge (A. 14, 15).

The Deputy Sheriff testified that the Sheriff had ordered him to "keep an eye" on the theatre (A. 20). This witness stated that he viewed only the final thirty minutes of the film "Cindy and Donna" from a vantage point on a road outside the theatre (A. 21).

Following the testimony of the Deputy Sheriff, the jury was permitted to view the film at a local indoor theatre (A. 25, 26).

Petitioner testified in his own behalf (A. 30). He stated that no juveniles had been admitted to see the film, and that he had received no complaints about the film until it was seized by the Sheriff (A. 31, 36).

Upon appeal to the Court of Appeals of Kentucky, petitioner urged as reversible error, the denial by the circuit court of his motion to suppress the film as evidence (Petition for Certiorari pp. 25-27). On June 25, 1971, the Court of Appeals of Kentucky rendered its opinion affirming the conviction (Petition for Certiorari pp. 25-30). Rejecting petitioner's arguments concerning the illegality of the seizure, the Kentucky Court held the decisions of this Court in Marcus v. Search Warrant of Property, 367 U. S. 717 (1961) and A Quantity of Copies of Books v. Kansas, 378 U. S. 205 (1964) were not applicable saying: "Those decisions relate to seizure of allegedly obscene material for destruction or suppression, not to seizure incident to an arrest for possessing, selling, or exhibiting a specific item." The Court of Appeals of Kentucky also stated that the decision of this Court in Lee Art Theatre v. Virginia, 392 U. S. 636 (1968) "is not applicable here" apparently because in Lee Art Theatre ". . . the film had been seized pursuant to a search warrant, not incident to an arrest." (Petition for Certiorari pp. 26, 27).

On December 17, 1971, the Court of Appeals of Kentucky denied a rehearing, and issued its mandate

affirming petitioner's conviction (Petition for Certiorari p. 31). The sentence imposed upon petitioner has not yet been executed.

SUMMARY OF ARGUMENT

The action of the Sheriff of Pulaski County, Kentucky, in seizing this film upon his own determination of its obscenity without any warrant, without any prior adversary hearings, and without any prior judicial scrutiny at all clearly abridged rights guaranteed to petitioner against state action by the First and Fourth Amendments through the Fourteenth Amendment of the Constitution of the United States of America. The decision of the Court of Appeals of Kentucky that the seizure was proper rests in direct contravention of clear pronouncements of this Court that an adversary hearing must precede the seizure of allegedly obscene material. Marcus v. Search Warrants of Property, 367 U. S. 717 (1961); A Quantity of Copies of Books v. Kansas, 378 U. S. 205 (1964).

A seizure of materials alleged to be obscene is subjected to much more stringent scrutiny under the Constitution than a seizure of ordinary contraband such as drugs or gambling equipment. In such instances because the right of freedom of expression is involved the procedures to which the accused is entitled are much more complicated. Because it imports danger of abridgment of the right of the public to unobstructed circulation of nonobscene matter, and to the end that the accused is not deprived of due process, a law enforcement officer cannot take it upon himself to deter-

mine that book or film is obscene and proceed to seize it. There must be a prior adversary proceeding.

The Court of Appeals of Kentucky in its Opinion attempted to distinguish the *Marcus* and *Books* decisions on the grounds that those cases related to massive seizures of large quantities of materials for destruction or suppression, as opposed to seizures incident to an arrest for an alleged crime committed in the presence of the arresting officer (Petition for Certiorari p. 26). There is no logical basis for such a distinction because there can be no difference in due process requirements between the seizure of a large number of books and the seizure of the single print of a motion picture film. Preventing a large group in the community from access to a film cannot be distinguished in the light of first amendment rights from preventing a similarly large number of books from being circulated. Moreover, determination by law enforcement officers of the status of films whether obscene or not is not enough protection to the owner to constitute due process. It is incongruous to condemn as vesting too abundant discretion in the enforcing officer, a search and seizure made on an overly broad warrant while at the same time permitting officers an unfettered discretion in seizure effected without a warrant under the guise of being incident to arrest. In both circumstances constitutionally compelled procedural safeguards are lacking. Therefore, there is no merit in distinguishing this case from *Books* and *Marcus* as the Kentucky Court of Appeals has done on the basis that the seizure in this case took place incident to arrest.

In Mapp v. Ohio, 367 U. S. 643 (1961) it was established that material seized by *state* officers in violation of the Due Process Clause of the Fourteenth Amendment is not admissible as evidence in a *state* court. Motion pictures are protected by the First and Fourteenth Amendments from state action that would abridge freedom of expression. Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 (1952). Since a violation of the First and Fourteenth Amendments infected the proceedings, petitioner was entitled to have the film suppressed as evidence upon making timely motion before the trial for such suppression. As in Lee Art Theatre v. Virginia, 392 U. S. 636 (1968), admission of the illegally seized film in evidence in this case, requires reversal of petitioner's conviction.

Borderline speech must be protected by the application of elaborate procedures prior to suppression via seizure. Such procedures are impossible to follow in a seizure incident to arrest such as occurred in this case. Only a tenacious adherence to such procedures assures a free society that the sensitive determination of obscenity will be made judicially and not ad hoc by police officers in the field. Here, no prior procedures whatsoever were followed. The petitioner has been denied due process of law as a result of the illegal seizure of the film and erroneous admission of it in evidence.

In order to vindicate petitioner's rights and redress the flagrant violation of due process of law which has been sanctioned by the Kentucky Court of Appeals, the judgment of the Kentucky Court of Appeals should be reversed.

ARGUMENT

The Denial of an Adversary Hearing Prior to Seizure of the Film in This Case is Inconsistent With the Decisions of This Court, and Amounts to a Flagrant Violation of Due Process of Law.

The decision of the Court of Appeals of Kentucky would permit local law enforcement officers an unfettered discretion to seize material alleged by them to be obscene without any legal safeguards or notice requirements whatsoever. The liberty of every citizen is thus placed in the hands of every peace officer with no opportunity on the part of the defendant to counter the judgment of the officer that the material seized is obscene. But the guarantee of a right to free speech and press makes any seizure of allegedly obscene expression a unique constitutional issue. This Court has held that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, without regard to the possible consequences for constitutionally protected speech; that the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn; and that the separation of legitimate from illegitimate speech calls for sensitive tools. Marcus v. Search Warrants of Property, 367 U. S. 717 (1961); Speiser v. Randall, 357 U. S. 513 (1958).

Here, the action of the Sheriff of Pulaski County, Kentucky, in seizing this film upon his own determination of its obscenity without any warrant, without any prior adversary hearing, and without any prior ju-

dicial scrutiny at all clearly abridged rights guaranteed to petitioner against state action by the First and Fourth Amendments through the Fourteenth Amendment of the Constitution of the United States of America. The decision of the Court of Appeals of Kentucky that the seizure was proper rests in direct contravention of clear pronouncements of this Court that an adversary hearing must precede the seizure of allegedly obscene materials. Thus in Marcus v. Search Warrants of Property, *supra,* this Court said:

> "We believe that Missouri's procedures as applied in this case lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complaints to be obscence."

Moreover:

> ". . . discretion to seize allegedly obscene materials cannot be confided to law enforcement officers without greater safeguards than were here operative. Procedures which sweep so broadly and with so little discrimination are obviously deficient in techniques required by the Due Process Clause of the Fourteenth Amendment to prevent erosion of the constitutional guarantee."

Before concluding the opinion in the Marcus case, the Court noted "there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." A state may not impose the ". . . extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity irrespective of whether or not the material is legally obscene." Thus the Marcus decision seems to establish beyond controversy that an adversary proceeding on the issue of obscenity is an essential prerequisite to seizure even if the material is obscene.

Even if a judicial injury precedes the seizure, it is still not enough to satisfy "Due Process" requirements for protection of free expression. Thus in A Quantity of Copies of Books v. Kansas, 378 U. S. 205 (1964), an *ex parte* inquiry by a judge prior to issuance of a warrant directing the seizure of a stack of paperback novels was held to be constitutionally deficient. This Court said:

> "For if seizure of books precedes an adversary determination of their obscenity, there is danger of the right of the public in a free society to unobstructed circulation of non-obscene books."

And further:

> "Here, as in Marcus, 'since a violation of the Fourteenth Amendment infected the proceedings, in order to vindicate appellant's constitutional rights' 367 U. S. at 738, 6 L. Ed. 2d at 1140, the judgment resting on a finding of obscenity must be reversed."

In both *Marcus* and *Books* this Court recognized that a seizure of materials alleged to be obscene is subject to much more stringent scrutiny under the Constitution than a seizure of ordinary contraband such as drugs or gambling equipment. As stated in *Books:*

> "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We reject that proposition in *Marcus.*"

In such instances because the right of freedom of expression is involved the constitutional procedures to which the accused is entitled, are much more complicated. To the end that the accused is not deprived of Due Process, a law enforcement officer cannot take it upon himself to determine that a book or film is obscene and proceed to seize it. Such is the teaching of the *Marcus* and *Books* cases.

But the Court of Appeals of Kentucky in its Opinion says that the *Marcus* and *Books* decisions "relate to seizure of allegedly obscene material for destruction or suppression, not to seizure incident to an arrest for possessing, selling, or exhibiting a specific item" (Petition for Certiorari, p. 26). Those decisions are thus distinguished by the Kentucky Court on the basis that the seizures in *Books* and *Marcus* were massive, and also on the ground that the seizure of this film was incidental to arrest for a crime committed in the presence

of the arresting officer. Such distinctions are completely without logical basis. In Bethview Amusement Corp. v. Cahn, 416 F. 2d 410 (2d Cir. 1969), cert. den. 397 U. S. 920 (1969), it was recognized that "a motion picture like a book, is entitled to the protection of the first amendment. That protection includes the requirement that an adversary hearing be provided before the allegedly obscene works can be seized." The Court in *Bethview* went on to point out that there can be no difference in due process requirements between the seizure of a large number of books and the seizure of the single print of a motion picture film:

> "We are told that the Bethview Theatre has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4,000 individuals would see the film. Preventing so large a group in the community from access to a film is no different in the light of first amendment rights from preventing a similarly large number of books from being circulated."

On this same reasoning the distinction made by the Kenutcky Court of Appeals between this case and the *Marcus* and *Books* cases is completely illogical. In Cambist Films, Inc. v. Tribell (E.D. Ky.) 293 F. Supp. 407 (1968) a three-judge Federal District Court sitting in Kentucky said:

> "Because the line between protected and unprotected speech, under the First Amendment, is so difficult to draw, and because First Amendment rights are of such fundamental importance to our

system of government, the Constitution requires a procedure 'designed to focus searchingly on the question of obscenity' before speech can be regulated or suppressed. (Citation omitted) The dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing."

Furthermore:

"Although A Quantity of Books, *supra*, involved a search and seizure in a civil forfeiture case, the principles there announced apply as well to a search and seizure for the purpose of gathering evidence for a criminal obscenity prosecution."

Thus distinction of this case from the principles of *Marcus* and *Books* on the basis that the latter involved massive seizure of large quantities of allegedly obscene items in civil forfeiture proceedings as opposed to the seizure of a single print of a film in this case is simply not warranted.

In Cambist Films, Inc. v. Duggan, 420 F. 2d 687 (3rd Cir. 1969) the United States Court of Appeals, Third Circuit, rejected the Notion that the seizure of the film in that case was lawful if made incident to a lawful arrest without a warrant for a crime committed in the presence of the arresting officer, saying:

"We cannot agree with the basic premise of the district court that police officers may, after viewing a motion picture themselves, determine whether

it is obscene, and if they determine it to be obscene, proceed to arrest the exhibitor and seize the film without a warrant. On the contrary, it is now settled that the First and Fourteenth Amendments to the Constitution require that there be an adversary judicial hearing and determination of obscenity before a warrant may be isued to search and seize alleged obscene materials. Marcus v. Search Warrants, 1961, 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127; A Quantity of Copies of Books v. State of Kansas, 1964, 378 U. S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809. Such a hearing and determination is *a fortiori* required where officers, as in this case, seize without a search warrant materials alleged by them to be obscene. For such a non-judicial *ex-parte* determination does not afford the owner due process of law."

The same view of this question has been expressed by a number of other United States Courts of Appeals in the following cases: Astro Cinema Corp. v. Mackell, 422 F. 2d 293 (2d Cir. 1970); Demich, Inc. v. Ferdon, 426 F. 2d 643 (9th Cir. 1970) reversed on other grounds 28 L. Ed. 2d 528 (1971); Metzger v. Pearcy, 393 F. 2d 202 (7th Cir. 1968); Tyrone, Inc. v. Wilkinson, 410 F. 2d 639 (4th Cir. 1969) cert. den., 396 U. S. 985 (1969). The decisions of the great majority of United States District Courts which have considered the question are in accord. Grove Press, Inc. v. Flask (N.D. Ohio E.D.) 326 F. Supp. 574 (1970), (three judge court); Carroll v. City of Orlando (M.D. Fla.) 311 F. Supp. 967 (1970), (three judge court with opinion citing 24 cases in accord and noting only 3 to the contrary);

Platt Amusement Arcade v. Joyce (W.D. Penn) 316 F. Supp. 298 (1970); United Artists, Theatre Circuit, Inc. v. Thompson (W.D. Ark.), 316 F. Supp. 815 (1970); and Bongiovanni v. Hogan (S.D.N.Y.) 309 F. Supp. 1364 (1970). A number of state courts have recognized the proposition. State v. Parisi, 76 N. J. Super, 115, 183 A. 2d 801 (1962); Stentel v. Smith, 18 A.D. 2d 458, 240 N.Y.S. 2d 200 (1963); and Flack v. Municipal Court for Anaheim-Fullerton, 66 Cal. 2d 981, 429 P. 2d 192 (1967). These authorities attest there is no merit in distinguishing the instant case from the *Marcus* and *Books* cases as the Kentucky Court of Appeals has done on the basis that the seizure which took place here was incident to an arrest. These authorities attest there is no valid reason for not applying the rationale of *Marcus* and *Books* to the instant case. While in the ordinary case a search incident to an arrest is not unreasonable if the arrest is lawful, the First Amendment compels more restrictive rules in cases in which the arrest and search relate to alleged obscenity. Determination by law enforcement officers of the status of films whether obscene or not is not enough protection to the owner to constitute due process. It is incongruous to condemn as vesting too abundant discretion in the enforcing officer, a search and seizure made on an overly broad warrant while at the same time permitting officers an unfettered discretion in seizures effected without a warrant under the guise of being incident to arrest. In both circumstances constitutionally compelled procedural safeguards are lacking. This incongruity is apparent in

the proclamation by the Kentucky Court of Appeals that Lee Art Theatre v. Virginia, 392 U. S. 636 (1968) "is not applicable here." The Court of Appeals of Kentucky erred most flagrantly and sanctioned a monumental violation of Due Process of Law in concluding that an adversary hearing was not required before seizure of the film in question.

The requirement of an adversary hearing prior to seizure of material alleged to be obscene is an ingredient of that broader and more fundamental "due process" precept that an individual is guaranteed a right to notice and hearing before he may be deprived of life, liberty or property. Citizens of the United States are entitled to a "meaningful opportunity to be heard" as part of the Due Process guarantee. Such is not only true in matters involving obscenity, but in many other areas.

Thus in Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) the Wisconsin prejudgment garnishment procedure was held violative of the fundamental principles of due process because of the absence of notice and prior hearing to the garnishee. In Goldberg v. Kelly, 397 U. S. 254 (1970), the Court held that procedural due process required that a welfare recipient be afforded an opportunity to be heard before his welfare payments could be terminated. Justice Brennan writing for the Court, noted that a crucial factor in the context of the case was that termination of said pending resolution of a controversy over eligibility "may deprive an *eligible* recipient of the very means by which to live while he waits. . . ."

"In the present context these (due process) principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witness and by presenting his own arguments and evidence orally."

In Boddie v. Connecticut, 401 U. S. 371 (1971), the Court held that due process of law prohibited a State from denying indigents access to the courts solely because of inability to pay court fees and costs in divorce actions. In the course of the opinion, Justice Harlan held that "a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."

Other recent decisions have continued this far reaching trend. Wisconsin v. Constantineau, 400 U. S. 433 (state statute authorizing the posting in liquor outlets of a notice prohibiting the sale of liquor to specified individuals, without notice or hearing prior to posting, held unconstitutional as amounting to denial of procedural due process); Hall v. Garson, 403 F. 2d 430 (5th Cir. 1970) (Texas statute giving landlord a lien on personal goods of tenants and authorizing landlord to enforce that lien by peremptory seizure of the property raised due process issue under the Constitution); and Santiago v. McElroy, 319 F. Supp. 284 (E.D. Pa. 1970), (Distress sales under distraint procedure of Pennsylvania Landlord and Tenant Act amounted to a taking of property without procedural due process

since sales did not follow a hearing of some sort before the tenant was deprived of his property).

But much more than private interest in property is affected by governmental action when suppression of any medium of communication is involved. In such case the public's right to know, the public's right to hear, the public's right to view is also in balance. The stakes are higher in a self-governing society when the exercise of freedoms of speech and press are affected. And it thus follows that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U. S. 58 (1963); and Freedman v. Maryland, 380 U. S. 51 (1965).

And so with respect to the *ex parte* seizure and suppression of films, books, magazines and other media of communication, the Court's rulings, and the decisions of the lower courts which followed have been undeviating. The fundamental postulant of the decisions has been that the seizure and suppression of expression without a prior adversary hearing to determine the alleged obscenity of the particular communication seized constitutes a prior restraint on the exercise of freedoms of speech and press in violation of the First, Fourth, and Fourteenth Amendments. This is reasonable because an adversary hearing achieves accurate factual and legal determinations; it facilitates close judicial scrutiny of the material; it assures attention to the relevant legal principles; and it makes certain that seizure or injunction will be limited only to these

items found to be obscene. The adversary proceeding thus avoids seizure and suppression of non-obscene material; minimizes the financial burdens of a seizure from a person's business; and of course insures the public's right to unobstructed viewing and reading of constitutionally protected matter.

There does not appear to be any overriding considerations which would justify the denial of a prior adversary hearing in a case involving the seizure of a motion picture film exhibited to the general public. The seizure of material in connection with the investigation of alleged violations of an obscenity law should not obviate the need for a prior adversary hearing. The decisions of the courts have shown that there are ample means available to a prosecution to assure that evidence will be available in the event of the institution of criminal proceedings. As stated in United States v. Alexander, 428 F. 2d 1169 (8th Cir. 1970):

> "It is frequently suggested and the Government so argues, that dealers in obscenity will be effectively immunized from prosecution if a prior adversary hearing is required in cases such as this. Several courts have faced this contention, and have demonstrated that a number of methods for securing the evidence remain available to the prosecutors. (Citations omitted) We believe these cases answer the government's concern."

And as stated in Bongiovanni v. Hogan, *supra:*

> "Moreover, seizure is not the exclusive method for initiating an obscenity prosecution and the state

may avoid the problems of a preliminary adversary hearing by seeking some other constitutionally permissible route."

It is most earnestly submitted that an adversary hearing prior to seizure or suppression of materials alleged to be obscene is a vital necessity for assuring that neither the public nor the exhibitor will be deprived of a motion picture film which is entitled to constitutional protection under the First Amendment. A prior adversary hearing is that "sensitive tool" which insures the separation of legitimate from illegitimate speech and press.

In this case since no adversary hearing was afforded to petitioner prior to the seizure by the Sheriff of Pulaski County, Kentucky, of the film "Cindy and Donna" the seizure was unreasonable, improper, and ilegal. It is elementary therefore, that the fruits of this illegal seizure should not have been available to the prosecution upon the trial, and that the film should have been suppressed as evidence upon petitioner's timely motion. But again the Court of Appeals of Kentucky, in utter defiance of clear decisions of this Court, ignored this basic principle of Constitutional law. In Mapp v. Ohio, 367 U. S. 643 (1961) it was established that material seized by *state* officers in violation of the Due Process Clause of the Fourteenth Amendment is not admissible as evidence in a *state* court. Through the Due Process Clause of the Fourteenth Amendment both the First Amendment protection of free speech and the Fourth Amendment protection against un-

reasonable searches and seizures are restrictions upon the states. Gitlow v. New York, 268 U. S. 652 (1925); Ker v. California, 374 U. S. 23 (1963). Motion pictures are protected by the First and Fourteenth Amendments from state action that would abridge freedom of expression. Joseph Burstyn, Inc. v. Wilson, 343 U. S. (1952). Lee Art Theatre v. Virginia, *supra,* conclusively supports petitioner's position because it says that admission in evidence of a film seized in violation of the Fourteenth Amendment requires a reversal of the conviction. There this Court reversed the conviction of a motion picture operator charged with showing obscene pictures in violation of Virginia Statutes. There, seizure of the films was carried out on the basis of an affidavit of a police officer which stated only the titles of the motion pictures and that the officer had determined from personal observation of them and of the billboard in front of the theatre, that the films were obscene. This Court said:

> "The admission of the films in evidence requires reversal of petitioner's conviction. A seizure of allegedly obscene books on the authority of a warrant 'issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered obscene' was held to be an unconstitutional seizure in Marcus v. Search Warrant, 367 U. S. 717, 731-732, 6 L. Ed. 2d 1127, 1135, 1136, 81 S. St. 1708. It is true that a judge may read a copy of a book in a courtroom or chambers but not as easily arrange to see this case whether the justice of the peace should have viewed the motion picture be-

> fore issuing the warrant. The procedure under which the warrant issued solely upon the conclusionary assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity', id. at 732, 6 L. Ed. 2d 1136, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See Freedman v. Maryland, 380 U. S. 51, 58-59, 13 L. Ed. 2d 649, 654, 655, 85 S. Ct. 734. "The judgment of the Supreme Court of Appeals of Virginia is reversed and the case is remanded for further proceedings not inconsistent with this opinion."

Lee Art Theatre conclusively illustrates that when a motion picture is illegally seized in violation of Due Process requirements, it is not admissible in evidence, and a conviction based upon it will not be permitted to stand. In this case no prior procedures whatsoever were followed. Upon the authority of Lee Art Theatre and the other decisions of this Court herein referred to, admission in this case of the illegally seized film requires reversal of petitioner's conviction.

Borderline speech must be protected by the application of elaborate procedures prior to suppression via seizure. Such procedures are impossible to follow in a seizure incident to arrest such as occurred in this case. Only a tenacious adherence to such procedures assures a free society that the sensitive determination of obscenity will be made judicially and not *ad hoc* by police officers in the field. By reason of the trampling

of petitioner's basic rights and because a violation of the Fourteenth Amendment infected the proceedings, it is most earnestly submitted that the judgment of the Court of Appeals of Kentucky should be reversed.

CONCLUSION

For the reasons herein stated the judgment of the Court of Appeals of Kentucky should be reversed and the conviction of the petitioner set aside.

Respectfully submitted,

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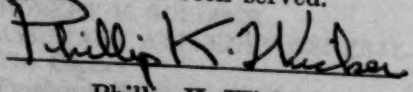
PROOF OF SERVICE

I, Phillip K. Wicker, attorney for the Petitioner herein, and a member of the Bar of this Court, hereby certify that on this 27th day of May, 1972, three copies of the Brief For The Petitioner were mailed first class, postage prepaid, to Hon. Robert V. Bullock, Esq, Assistant Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky, 40601, Counsel for the Respondent. I further certify that all parties required to be served have been served.



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